No. 04-1739

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IN THE

Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

RONALD BANKS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a prison policy that denies newspapers, magazines, and photographs to the most difficult inmates in the prison system in an effort to promote security and good behavior violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.[1] Prison administration is a core function of all States and many local governments. The proper application of the standards of judicial review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), regarding the deference which federal courts must show to the decisions of prison administrators is therefore of continuing concern to *amici* and their members.

As the Court held in *Turner*, federal courts "are ill equipped to deal with the increasingly urgent problems of prison administration," *id.* at 84 (citation omitted), and must uphold prison regulations challenged as unconstitutional if "reasonably related to legitimate penological interests." *Id.* at 89. Moreover, in this case, which involves judicial review of state prison administration, federal courts have "additional reason to accord deference to the appropriate prison authorities." *Id.* at 85 (citation omitted).

The court of appeals disregarded this Court's teachings in *Turner* and other cases to hold unconstitutional Pennsylvania's policy of denying newspapers, magazines, and photographs to what the lower court recognized were "the most incorrigible and difficult prisoners" in the State's custody. Pet. App. 11a. In so holding, the court disregarded the reasonable judgment of the State's prison administrators and engaged in precisely the sort of micromanagement of state prisons that this Court has repeatedly held to be impermissible. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 361-63 (1996).

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members has made a monetary contribution to the preparation or submission of this brief.

Because the holding of the court of appeals improperly restricts the ability of prison administrators to manage correctional facilities in ways clearly related to legitimate penological interests, *amici* submit this brief to assist the Court in the resolution of this case.

SUMMARY OF ARGUMENT

In *Turner v. Safley*, 482 U.S. 78, 85 (1987), the Court "formulate[d] a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." (internal citation and quotation omitted) The court of appeals misapplied each of the four *Turner* prongs to Pennsylvania's regulation that denies newspapers and magazines to those inmates who, because of their intractability, have been assigned to LTSU Level 2. Moreover, in violation of *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), the panel majority shifted the burden of proof from respondent, to disprove the validity of the regulation, to the State to prove its validity.

1. The court of appeals held that the State's regulation lacks a rational relationship to a legitimate penological interest. While the court acknowledged that the State had a strong penological interest in deterring infractions of prison rules, it also observed that confinement in LTSU Level 2 can be of an indeterminate duration. The court therefore concluded that the State's "rehabilitation justification" was "illogical." Pet. App. 12a. The court also faulted the State because it "offered no evidence that the rule achieves or could achieve its stated . . . purpose." *Id.*

This reasoning is erroneous. Under *Turner* and *Overton*, the State has no obligation to offer evidence showing that the LTSU rule achieves its stated purpose. Rather, under *Turner*'s first prong, the State is only required to articulate a

plausible justification for its regulation. There are several plausible justifications for the State's rule.

For example, it is rational to believe that denying privileges to troublesome inmates will induce them to modify their behavior and obey prison rules whether their initial assignment to LTSU Level 2 is for a fixed or indeterminate duration. Moreover, the policy serves as an incentive to those inmates who are not in the LTSU—whether they are in the general population or one of the other units used to manage difficult inmates—to behave or suffer the loss of their privileges through assignment to the LTSU. The court of appeals failed to recognize this "self-evident connection to the State's interest in maintaining prison security" and order. *Overton*, 539 U.S. at 133.

2. The court of appeals erroneously held that LTSU Level 2 prisoners did not have adequate alternative means for exercising their First Amendment rights. According to the court, the State's rule imposed a "blanket" prohibition on Level 2 prisoners' access to newspapers and magazines. Pet. App. 19a.

The court ignored that Level 2 inmates retain significant First Amendment rights. They can engage in expressive activity by writing letters. Moreover, they can obtain books from the prison library. They can obtain information about political and social events by asking that their family members include such information in their letters. Level 2 prisoners can also receive this information from family members during monthly visits. Finally, Level 2 prisoners can gain access to newspapers and periodicals by modifying their behavior.

3. The court of appeals further erred in holding that there were two ready alternatives to the State's regulation. According to the court, the State could distribute a newspaper or magazine to each inmate who requested one and retrieve it at the end of a reading period. *See id.* at 22a. Alternatively, the

State could escort each inmate to the mini-law library where they could "read a periodical of their choosing." *Id.* at 23a.

Both alternatives are problematic because they would result in an increase in the number of interactions between guards and inmates and thus raise the potential number of security incidents. Under the first alternative, the guards would still have to retrieve the newspaper at the end of the reading period at which time an inmate could use it to commit an assault. And given the troublesome nature of Level 2 inmates, it is reasonable to believe that on occasion some might refuse to return the newspaper and thus cause a confrontation with the guards.

Under the second alternative, it is obvious that prisoner demand for library visits would increase substantially because being able to look at newspapers and magazines would reduce the harshness of LTSU confinement. While the court of appeals "fail[ed] to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library" would burden the State, *id.* at 24a, it is rational to believe that many prisoners would find newspapers and magazines more entertaining than the Federal Reporter series and insist upon receiving every visit that the State's regulations entitle them to. This alternative would clearly result in substantial additional burdens upon the prison system and its personnel, including the guards needed to escort inmates on library visits.

ARGUMENT

THE COURT OF APPEALS FAILED TO GIVE PROPER DEFERENCE TO THE JUDGMENT OF PENNSYLVANIA'S PRISON OFFICIALS

The court of appeals held violative of the First Amendment Pennsylvania's policy that denies newspapers, magazines and photographs to those inmates who are so troublesome as to

warrant assignment to Level 2 of the State's Long Term Segregation Unit (LTSU). Notwithstanding that inmates assigned to the LTSU Level 2 are "the most incorrigible and difficult prisoners" in the State's custody, Pet. App. 11a, the court rejected Pennsylvania's contention that the policy was justified by its legitimate penological interests in encouraging LTSU prisoners to modify their behavior and in preserving institutional security.

In so holding, the court of appeals engaged in micro-managing of the most intrusive sort and ignored the fundamental teachings of *Turner v. Safley*, 482 U.S. 78 (1987). While the court's opinion pays lip service to the *Turner* factors, its application of them reflects a blatant disregard for *Turner*'s instruction regarding the respective roles and competencies of the courts and prison administrators. As explained below, in analyzing the first *Turner* factor, the court failed to defer to the expert judgments of the State's prison administrators. Instead, the panel majority imposed heightened scrutiny by requiring that the State adduce empirical proof that prison policies will achieve the desired objective and by dismissing the rational judgments of administrators.

The court below also erred in analyzing the impact that accommodation of the right would have on the prison and whether there are alternative means for the State to accomplish its penological objectives. Indeed, the problematic nature of the alternatives suggested by the court demonstrates why prison administrators and not judges should make decisions of this sort. The judgment of the court of appeals should therefore be reversed.

A. In Reviewing Prisoners' Constitutional Claims Federal Courts Are Required To Show Appropriate Deference To The Policy Decisions Of Prison Administrators

The Court has held that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," and that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner*, 482 U.S. at 84. Thus, as a general proposition it is undisputed that prisoners retain some constitutional rights, including some First Amendment protections.

"[I]t is obvious," however, that prisons "differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977).

The Court has therefore long recognized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285 (1948) (quoted in *Jones*, 433 U.S. at 125 (collecting cases)). As the Court further explained in *Jones*, "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." 433 U.S. at 125. The Court has accordingly held that:

> [A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and

> care the prisoner has been committed in accordance with due process of law.

Pell v. Procunier, 417 U.S. 817, 822 (1974) (quoted in *Jones*, 433 U.S. at 125).

This Court has repeatedly recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Turner*, 482 U.S. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)); *see also Lewis v. Casey*, 518 U.S. 343, 361-63 (1996); *Jones*, 433 U.S. at 126. As the Court recognized in *Turner*, "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." 482 U.S. at 84-85. And "[w]here a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." *Id.* (citing *Martinez*, 416 U.S. at 405). *See also Lewis*, 518 U.S. at 362 (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973)); *Jones*, 433 U.S. at 126 (quoting *Martinez*, 416 U.S. at 405).

The Court has accordingly directed that federal courts should "ordinarily defer to [the] expert judgment" of state prison administrators in setting penological policies. *Pell*, 417 U.S. at 827. As the Court explained in *Jones*, "[b]ecause the realities of running a penal institution are complex and difficult, we have . . . recognized the wide-ranging deference to be accorded the decisions of prison administrators." 433 U.S. at 126.

This Court adopted the *Turner* standard to give appropriate weight to these important considerations. *See* 482 U.S. at 85. As the *Turner* Court explained, "[o]ur task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights." *Id.* (quoting *Martinez*, 416 U.S. at 406).

The four-prong *Turner* standard is not "a standard of heightened scrutiny." *Id.* at 87. Yet, as explained below, the court of appeals plainly applied a heightened standard of review to Pennsylvania's LTSU policy. Moreover, contrary to this Court's explicit instruction in *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), and earlier cases, *see id.* (collecting cases), the panel majority shifted the burden of proof from the prisoners to disprove the validity of the regulation to the State to prove its validity. The court below thus did exactly what *Turner* admonishes that federal courts must not do: it became "the primary arbiter[] of what constitutes the best solution to [an] administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.'" 482 U.S. at 89 (quoting *Martinez*, 416 U.S. at 407). The judgment below should therefore be reversed.

B. Pennsylvania's Policy Of Denying Newspapers, Magazines And Photographs To LTSU Level 2 Inmates Satisfies The *Turner* Standard

In *Turner*, the Court articulated four factors for determining whether a prison rule violates a prisoner's constitutional right: "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, the Court examines "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third, the Court determines "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Finally, the Court examines "whether there are 'ready alternatives' to the regulation." *Overton*, 539 U.S. at 132 (citing *Turner*, 482 U.S. at 90-91).

1. *The LTSU Policy Has A Valid, Rational Connection To A Legitimate Governmental Interest.*

Under the first *Turner* factor, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89. The Court has explained that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Furthermore, "the governmental objective must be a legitimate and neutral one." *Id.* at 90.

The court of appeals repeatedly ignored that these formulations do not impose a standard of heightened scrutiny but rather that of rational basis review. Under rational basis review, the State does not have the obligation of proving the validity of its regulation. *See Overton*, 539 U.S. at 132; *cf. Heller v. Doe*, 509 U.S. 312, 320 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.") (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). Rather, the burden is on "the prisoner to disprove it." *Overton*, 539 U.S. at 132. And under the classic formulation, "'[t]he burden is on the one attacking the [rule] to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 320-21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).[2]

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[2] *Amici* acknowledge that the source of these rational basis formulations were cases that challenged legislative classifications. But whether a court is reviewing the action of a legislative body or the policy decision of prison administrators, the same separation of powers concerns exist. As *Turner* explains, "[p]rison administration is . . . a task that has been committed to the responsibility of [the legislative and executive] branches, and separation of powers concerns counsel a policy of judicial restraint." 482 U.S. at 85.

The court of appeals acknowledged that "'deterrence of future infractions of prison rules' is a legitimate penological interest." Pet. App. 10a (quoting *Gregory v. Auger*, 768 F.2d 287, 290 (8th Cir. 1985), and citing *Daigre v. Maggio*, 719 F.2d 1310, 1313 (5th Cir. 1983)). The court also "agree[d] that deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates." *Id.* at 11a. The court, however, then faulted the State for not having "shown how the regulations in this case serve such a purpose." *Id.*

This was so, the court reasoned, because "[t]he LTSU is not a place where inmates are sent for a discrete period of punishment, pursuant to a specific infraction, but is a place for 'Long Term' segregation of the most incorrigible and difficult prisoners as long as they fall under that umbrella." *Id.* Noting that "several inmates have remained in Level 2 since the LTSU's inception two years ago," *id.* at 12a, the court observed that "[a]s administered, it is unclear how the policy would achieve the deterrence it seeks." *Id.* The court thus concluded that "[n]ot only is the rehabilitation justification illogical given the nature of LTSU confinement, but LTSU Level 2 is a far cry from the disciplinary contexts in which such bans have been deemed constitutional." *Id.* The court further faulted the State because it "offered no evidence that the rule achieves or could achieve its stated rehabilitative purpose." *Id.* at 14a n.10.

The court's reasoning reflects several fundamental errors. Under *Overton* and other cases, the State is not required to offer evidence that, as the court of appeals put it, "the rule achieves or could achieve its stated . . . purpose." *See Overton*, 539 U.S. at 132. Rather, the burden is on the inmates to show that the rule serves no legitimate penological purpose. *See id.*

It is thus immaterial that the State produced no affidavits establishing the effectiveness of the prohibition in inducing

inmates to modify their behavior. And the court of appeals' belief that its "insistence that the DOC offer some evidence is not . . . at odds with *Turner* but rather a complementary part of the analysis in determining whether an asserted goal is logically connected to the prison regulation," Pet. App. 14a n.10, is flatly contradicted by *Overton* and other cases which clearly place the burden on "the prisoner to disprove" the validity of a regulation. *See Overton*, 539 U.S. at 132 (citing *Shaw v. Murphy*, 532 U.S. 223, 232 (2001); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Jones*, 433 U.S. at 128).[3] In short, under the first prong of *Turner*, the State is only required to articulate a plausible justification for its regulation; it has no obligation to produce empirical evidence showing that its regulation is effective. Thus, the purported "paucity of any such evidence" proving the effectiveness of the LTSU prohibition in "achiev[ing] its stated rehabilitative purpose," Pet. App. 14a n.10, is of no legal consequence.[4]

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[3] Further demonstrating its fundamental misunderstanding of this Court's prisoners' rights jurisprudence, the court of appeals faulted the district court because it "did not examine the fit between the policy and its rehabilitative goals, whether the ban was implemented in a way that could modify behavior, or inquire into whether the DOC's deprivation theory of behavior modification had any basis in real human psychology, or had proven effective with LTSU inmates." Pet. App. 13a. These criticisms find no support in this Court's cases. They reflect heightened scrutiny, an approach incompatible with *Turner* and its progeny. *See, e.g.*, *Shaw*, 532 U.S. at 230 ("[U]nder *Turner* . . . prison officials are to remain the primary arbiters of the problems that arise in prison management."); *see also id.* at 232 ("To prevail, [a prisoner] must overcome the presumption that the prison officials acted within their broad discretion.") (internal quotation and citation omitted).

[4] At the time of Deputy Superintendent Dickson's deposition, 10 inmates had "graduated" from the LTSU and been transferred to other institutions, Opp. App. 95 (Dickson Dep. 27), and three inmates had been promoted to Level I. *Id.* at 93 (Dickson Dep. 17). Considering that "the main reasons for an inmate to come to the LTSU" include an inmate's having failed to complete the Special Management Unit, *id.* at 95 (Dick-

That the State's LTSU policy "has a 'valid, rational connection' to a legitimate governmental interest," *Overton*, 539 U.S. at 132 (citation omitted), is established by the court of appeals' acknowledgment "that deterrence of future infractions of prison rules can be an appropriate justification for temporarily restricting the rights of inmates." Pet. App. 11a. Indeed, as a general matter it is rational to believe that denying privileges to troublesome inmates will induce them to modify their behavior and obey prison rules whether or not their initial assignment to LTSU Level 2 is for a fixed or indeterminate duration.

Relatedly, the LTSU policy has a valid, rational connection to the State's legitimate penological interest in obtaining compliance with prison rules for another reason. The policy serves as an incentive to those inmates who are not in the LTSU—whether they are in the general population or one of the other units used to manage difficult inmates—to behave or suffer the loss of privileges. As the dissenting judge below explained: "It is 'rational' for corrections officials to think that inmates who are not in Level 2 will be deterred from engaging in serious misconduct because they do not want to be transferred to that unit and thus . . . be subjected to the restrictions that accompany that assignment." *Id.* at 26a-27a (Alito, J., dissenting). The court of appeals, however, failed to recognize this "self-evident connection to the State's interest in maintaining prison security" and order. *Overton*, 539 U.S. at 133.

Ignoring this alternative interest served by the LTSU rule, the court of appeals apparently found persuasive respondent's contention that "isolating prisoners from the going[s]-on in

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son Dep. 28), a form of disciplinary segregation that is not as severe as the LTSU, there is—contrary to the view of the court of appeals—substantial evidence that the LTSU policy induces troublesome inmates to modify their behavior.

the outside world tends to undercut any genuine rehabilitation." Pet. App. 13a. Notwithstanding that there was "no evidence in the record on this point," and that respondent had only "cite[d] to language in several cases," the court speculated that "[i]t certainly seems relevant to the . . . inquiry, as well as likely, that the ban *may produce* less rather than more compliance in at least some inmates." *Id.* at 13a-14a (emphasis added). *See also id.* at 13a n.9 (asserting that "[r]ehabilitative goals are 'furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates'") (quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985)).

This reasoning refutes any claim that the court of appeals adhered to the principles of *Turner* and its progeny. While *Overton* makes clear that the prisoners bear the burden of proving—with evidence—the invalidity of a regulation, the court of appeals rejected the State's justification not on the basis of evidence but based purely on its own speculation that the LTSU policy does not work. The snippets from judicial opinions cited by the court of appeals, *see id.* at 13a n.9, do not establish that the LTSU policy lacks a rational connection to a legitimate penological interest. The court of appeals' reliance on them is a transparent attempt to impose its own judgment as to what constitutes a valid penological goal.

Indeed, the court of appeals' invocation of these passages demonstrates the soundness of this Court's long-standing directive that federal "courts should ordinarily defer to [the] expert judgments" of state prison administrators in setting penological policies. *Pell*, 417 U.S. at 827. Two of the cases—*Abdul Wali* and *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001)—involved First Amendment restrictions on prisoners in the general population. Tellingly, although the court of appeals in this case faulted Pennsylvania for failing to produce evidence that the LTSU rule would achieve its stated purpose, Pet. App. 14a n.10, in *Abdul Wali* the Second Circuit

cited no evidence in support of its assertions as to what constitute proper penological goals. *See* 754 F.2d at 1033-34. And in *Morrison* the Ninth Circuit relied on two newspaper articles to support its holding, reasoning that there is a "'correlation between reading, writing and inmate rehabilitation.'" 261 F.3d at 904 n.7 (citation omitted) (quoted at Pet. App. 13a n.9).[5]

Thus, the conclusion that "isolating prisoners from the going[s]-on in the outside world tends to undercut any genuine rehabilitation," Pet. App. 13a, which the court of appeals found both "relevant" to the *Turner* prong-one inquiry and "likely" as a factual matter, is without foundation. *Id.* at 13a-14a. And even if there is a "correlation between reading, writing and inmate rehabilitation," *id.* at 13a n.9 (citation omitted), the State allows Level 2 prisoners to read books and write letters. *See* Opp. App. 77a. In any event, the court of appeals' conclusion says nothing about the strength of the correlation and whether the proposition holds true for all 42,000 inmates in Pennsylvania's prison system. *See* Pennsylvania Dep't of Corrections, Monthly Population Report As of Nov. 30, 2005 <available at http://www.cor.state.pa.us/portal/lib/portal/monthly_population.pdf>.

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[5] The court of appeals also noted that in a case involving the Alabama prison system "there was testimony that deprivation of reading materials in segregation can cause 'psychological deterioration' which in turn can cause inmates either to be 'very withdrawn and curl up in infancy, or [to] become acting out and aggressive people.'" Pet. App. 13a n.9 (quoting *Spellman v. Hopper*, 95 F. Supp.2d 1267, 1281 (M.D. Ala. 1999)).

There is, however, "no evidence in the record on this point." *Id.* Nor is this assertion a proper subject for judicial notice. *See* Fed. R. Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute[.]"). In any event, Level 2 inmates are allowed to obtain books from the library. *See* Pet. App. 14a.

The inmates assigned to the LTSU comprise one tenth of one percent of Pennsylvania's state prison population. Pet. App. 25a (Alito, J., dissenting). They are—as the magistrate judge found—"'the most incorrigible, the most difficult, [and] problematic'" of all the prisoners in the state system "'and have demonstrated the most behavior conflicts.'" Pet. App. 34a-35a (Op. Mag. J.) (citation omitted); *see also* Pet. App. 25a (Alito, J., dissenting). "Indeed, [inmates] are in the LTSU because efforts in other units [where they had access to newspapers and magazines] failed." *Id.* at 40a (Op. Mag. J.). Moreover, some inmates may have committed crimes of such a serious nature and received such lengthy sentences (e.g., life) that they have no interest in rehabilitation as the court of appeals has redefined that term. And in the unique culture of prisons, some inmates may take special pride in being intractable and disruptive. *Cf.* Emma Clare *et al.*, Gov't of the U.K., Home Office Research, Development and Statistics Directorate, *Evaluation of Close Supervision Centres* 52 (2001) ("[G]iven the nature of the prison environment and culture . . . there are many pressures operating on prisoners to maintain their disruptive behaviour.").

"The question of what motivates disruptive prisoners is extraordinarily complex[.]" *Id.* at 123 (Appendix A). Determining what measures are necessary to induce LTSU inmates to modify their behavior is a matter which is manifestly within the expertise of prison administrators and not federal judges. In substituting its own judgment for that of Pennsylvania's prison administrators as to what constitute valid penological goals, the court of appeals failed to accord proper deference to the State's officials and thus violated the fundamental teaching that "prison officials are to remain the

primary arbiters of the problems that arise in prison management." *Shaw*, 532 U.S. at 230 (citing *Turner*, 482 U.S. at 89).[6]

2. *LTSU Inmates Have Sufficient Alternative Means of Exercising Their First Amendment Rights*

Turner's second factor "is whether there are alternative means of exercising the right that remain open to prison inmates." 482 U.S. at 90. As *Turner* explains, "[w]here 'other avenues' remain available for the exercise of the asserted right, *Jones*, 433 U.S. at 131, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" 482 U.S. at 90 (quoting *Pell*, 417 U.S. at 827).

The court of appeals apparently accepted respondent's argument "that while Level 2 inmates can read leisure books, they have no meaningful access to current news accounts or published information about current political, social, or other public events and activities occurring outside the prison walls." Pet. App. 19a. Likewise, "they have no way to look

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[6] The court of appeals also rejected the State's contention that the prohibition serves a legitimate penological interest because the proscribed reading materials could potentially be used as weapons or to start fires. *See* Pet. App. 14a-18a. Here, too, the court ignored the self-evident connection between the rule and the State's penological interests and instead subjected the State's justification to heightened scrutiny. *See, e.g.*, *id.* at 16a ("[W]e agree with Banks that given the materials Level 2 inmates are permitted in their cells, prohibiting a single newspaper or magazine has no *significant* relationship to the stated security objectives.) (emphasis added).

As explained above, *Turner* and its progeny only require a rational relationship. *See* 482 U.S. at 89-90. Moreover, the court's approach is counterproductive to the interests of prisoners. If a State cannot ban items for security reasons because it allows inmates to possess other items that can also be used for improper purposes, States would have an incentive to impose even greater restrictions on inmates' possessions.

at images of loved ones and friends apart from the possibility of infrequent visits." *Id.*

The court of appeals reasoned that the LTSU rule was a "blanket" prohibition and "that as long as an inmate is at Level 2 status and is subject to the policy in question, he has no alternative means to exercise his First Amendment right of access to a reasonable amount of newspapers, magazines, and photographs." Pet. App. 19a-20a. While acknowledging that Level 2 inmates can gain access to the prohibited materials by behaving and thereby getting promoted out of the LTSU, the court apparently found this insufficient because "segregation in Level 2 is not linked to a particular infraction, and is of potentially unlimited duration." *Id.* at 20a. The court apparently was also concerned with the adequacy of the process for reviewing Level 2 status. *See id.* ("There are no affidavits in the record from any of those decision-makers mentioned by Dickson, nor is there any documentation of the review process."). The court thus concluded that "the LTSU prohibition cannot be characterized as merely a 'time, place or manner' restriction." *Id.* at 21a. (citation omitted).

The court's reasoning reflects a fundamental misunderstanding of this Court's prisoner rights cases. *Turner* itself rejects the notion that the Court's "time, place, or manner" jurisprudence is pertinent in evaluating prison regulations that implicate First Amendment rights. *See* 482 U.S. at 87-88. Indeed, it is strange to apply a doctrine whose purpose is to assess the validity of governmental regulation of speech in a *public forum* to the regulation of speech in prison.

True enough, *Pell v. Procunier* cited several time, place and manner cases. *See* 417 U.S. at 826. But as *Turner* observed, the regulation at issue in *Pell* was not "a 'time, place, or manner' restriction in any ordinary sense of the term." 482 U.S. at 88. Thus, while *Pell* recognized that "the alternative methods of personal communication still available to prisoners would have been 'unimpressive' if offered to

justify a restriction on personal communication among members of the general public . . . . [T]hey were relevant in determining the scope of the burden placed by the regulation on inmates' First Amendment rights." *Id.* at 88 (quoting *Pell*, 417 U.S. at 825).

While the burden imposed on Level 2 inmates' First Amendment rights is not insignificant—otherwise it would serve no penological purpose—Level 2 inmates retain substantial First Amendment rights. For instance, they can engage in expressive activity by writing letters. Moreover, they can obtain books from the prison library.

Level 2 inmates also have several alternative means of obtaining access to information about political and social events. While they cannot receive news clippings unless they relate to them or their families, they can receive personal correspondence. *See* Opp. App. 77. The LTSU rule does not prevent an inmate from requesting that family members include within their letters a discussion of current events. *See* Pet. App. 28a (Alito, J. dissenting); *id.* at 41a-42a (Op. Mag. J.). Similarly, inmates can also receive information regarding news events during their monthly visits with family members. *See id.* at 41a-42a. The court of appeals ignored these alternatives.

Furthermore, as the district court found, Level 2 prisoners can obtain newspapers and magazines by modifying their behavior and gaining promotion to Level 1. *See id.* at 41a; *see also id.* at 28a (Alito, J., dissenting). The court of appeals, however, rejected this alternative, explaining that Level 2 segregation "is not linked to a particular infraction, and is of potentially unlimited duration." *Id.* at 20a.[7]

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[7] Under almost all of the criteria that render an inmate subject to transfer to the LTSU, *see* Pet. App. 3a n.2, "particular infraction[s]" are relevant. *Id.* at 20a. For example, "engaging in facility disturbances" or "assaultive behavior with the intent to cause death or serious bodily

This aspect of the program does not, however, present a First Amendment question. Indeed, the court's reasoning ignores that the duration of the prohibition is within each inmate's power to control. And even if this feature of the program were relevant in determining the validity of the rule, once again the court of appeals failed to follow this Court's *Overton* holding.[8]

3. *Respondent's Proposed Accommodations Would Have A Substantial Impact On Prison Management And There Are No Ready Alternatives*

Under *Turner*'s third and fourth prongs, a court must consider "'the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,' and 'the absence of ready alternatives' available to the prison for achieving the governmental objectives." *Shaw*, 532 U.S. at 230 (quoting *Turner*, 482 U.S. at 90). The Court has recognized that "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner*, 482 U.S. at 90. The Court has further made clear that *Turner*'s fourth prong "is

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injury" would seem to clearly involve a particular infraction. Moreover, none of the plaintiffs have alleged that their assignment to the LTSU was not based on a particular infraction or that they have been improperly kept in Level 2 status. *See* Opp. App. 1a-10a (Complaint).

[8] That "[t]here are no affidavits in the record from any of those decision-makers" on the unit management team, *id.* at 20a, the lack of "any documentation of the review process," *id.*, and the absence of any documents in the record "which indicated, with respect to current LTSU inmates, how long they had been at the facility and how long they had been at Level 2," *id.* at 20a-21a, are evidentiary matters which respondent had the burden of proving. *See Overton*, 539 U.S. at 132. There was thus no evidentiary basis for the court of appeals to rule against the State on the second *Turner* prong.

not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91 (citation omitted). If, however, a prisoner "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

The court of appeals accepted respondent's contention that there were two alternative policies which could accommodate inmates' rights with minimal impact on prison resources and safety. *See* Pet. App. 22a-23a. According to the court, the State "could establish a specific reading period, or several different reading periods, in which guards deliver a single newspaper or magazine to an inmate's cell, if requested, and retrieve it at the close of the period." *Id.* at 22a. In the court's view, "[e]ven if limited distribution of periodicals were to require additional monitoring, such an accommodation would have a minimal impact on prison resources." *Id.* at 23a.

The court also accepted respondent's suggestion that inmates "could be escorted to the secure mini-law library to read a periodical of their choosing." *Id.* at 23a. The court reasoned that "[i]nmates are already permitted to leave their cells under guard escort to use the library to view legal materials, so individual inmate escort has not been deemed prohibitively burdensome or dangerous by prison administrators." *Id.* at 23a-24a.

In analyzing these alternatives, the court of appeals again substituted its own judgment for that of the State's prison administrators and misapplied the *Turner* standard. The court did pay lip service to the fact that "Level 2 inmates are some of the most 'intractable' in the Pennsylvania prison system." *Id.* at 22a. The court ignored, however, the fundamental fact

that both alternatives would result in an increase in the number of interactions between guards and inmates and thus raise the potential number of security incidents.

For example, under the first alternative, the guards would still have to retrieve the newspaper at the end of the reading period at which time an inmate could use it to commit an assault. *See* Pet. App. 45a (Op. Mag. J.). In addition, given the troublesome nature of Level 2 inmates, it is reasonable to believe that on occasion some might refuse to return the newspaper, thus creating the potential for a confrontation between themselves and the guards and raising the possibility of injury to either the inmate or the guards.

While the court of appeals acknowledged that those inmates who "abuse[] their use of periodicals," *id.* at 23a, could thus have their "access to periodicals . . . be entirely withheld," *id.* at 22a, the court's rule would allow Level 2 inmates at least one opportunity to misuse them.[9] Moreover, even the court acknowledged that it would "require additional monitoring," *id.*, *i.e.*, that more guards would have to be assigned to the LTSU. Thus, contrary to the views of the court below, this alternative would have more than a *de minimis* impact on prison resources.

The alternative of escorting prisoners to the mini-law library is equally problematic. While the court of appeals admitted that "it is possible that the *demand* for mini-law library sessions may increase if the policy were changed," the court faulted the State for failing show "how this would significantly increase the burden on prison staff." *Id.* at 24a. It is obvious, however, that prisoner demand for library visits

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[9] The court of appeals also suggested that access to newspapers "could be entirely withheld from those individual prisoners who, in the judgment of prison officials, *would* pose a particular risk given their records." Pet. App. 22a-23a. Pennsylvania's officials have, however, already made this finding when determining that an inmate should be placed in Level 2.

would increase substantially for the reason that being able to look at newspapers and magazines would reduce the harshness of LTSU confinement. While the court of appeals "fail[ed] to see how the mere addition of non-legal and non-religious periodicals to the materials already available to the inmates in the library" would burden the State, *id.*, it is rational to believe that many prisoners would find newspapers and magazines more entertaining than the Federal Reporter series and would be sure to demand every visit that the DOC's regulations entitle them to. This alternative would thus clearly result in substantial additional burdens on the prison system.[10]

Finally, the court of appeals rejected the district court's conclusion that the prisoners' alternatives would impose "more than a *de minimus* [sic] cost to the DOC's behavior modification goals because the accessibility of periodicals would render the threat of Level 2 segregation toothless as a deterrent." Pet. App.25a. In this regard, the court of appeals reasoned that "even without the challenged restriction, Level 2 . . . segregation is more restrictive than Level 1 in significant respects." *Id.*

The scope of restrictions necessary to induce Level 2 inmates to modify their behavior is, however, a matter which is uniquely within the expertise of prison administrators and not federal judges to decide. The court of appeals disregarded this Court's admonition that federal courts are not to "become the primary arbiters of what constitutes the best solution to" the problems that arise in running prisons.

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[10] *Cf.* Chase Riveland, U.S. Dep't of Justice, *Supermax Prisons: Overview and General Considerations* 9 (1999) ("The number of staff required to move each inmate from a cell to the exercise space and back three to seven times each week is considerable. As these events also constitute the most frequent time that the inmate is out of his/her cell, they also present the most likely opportunity for resistive or combative behavior or the exchange or introduction of contraband.").

Turner, 482 U.S. at 89. In this and numerous other ways discussed above, the court of appeals' reasoning squarely conflicts with this Court's teachings.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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